Felda Plantations Sdn Bhd v Arab Malaysian Bank Bhd

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1002 OF 2006
ZAINUN ALI, RAMLY ALI AND AZHAR MA'AH JJCA
7 DECEMBER 2011

B

Contract — Guarantee — Construction — Whether guarantee was on demand — Whether demand in writing would trigger off payment — Liability of guarantor — Intervening interlocutory injunction restrained plaintiff from asserting its claim against defendant — Whether letter of demand served on guarantor before expiry of guarantee — Whether defendant was legally bound to honour guarantee

C

D

When Bacom Marketing Sdn Bhd ('BMS'), a contractor, entered into a contract with the plaintiff, the defendant bank issued a letter of guarantee, whereby it absolutely guaranteed and irrevocably agreed to pay to the plaintiff the amount of RM1,063,444.30 on demand. This guarantee was effective from 1 January 1997 to 31 December 1997. Following a breach of the contract by BMS, the plaintiff issued a letter of demand dated 23 December 1997 ('the letter of demand') to the defendant demanding payment of the amount stated in the letter of guarantee. The defendant applied for and obtained an ex parte interlocutory injunction to restrain the plaintiff from asserting its claim against the defendant. The ex parte injunction was set aside following an inter parte hearing on 26 September 2000. The plaintiff then demanded payment of the amount stated in the letter of guarantee but the defendant failed to make any payment despite the plaintiff's numerous reminders. This led to the plaintiff filing the present action for non-payment of monies, which the plaintiff had claimed pursuant to the letter of demand, followed by an application for summary judgment pursuant to O 14 of the Rules of the High Court 1980. The registrar allowed the plaintiff's application summary judgment with costs but the defendant appealed against that decision. The High Court judge found that the guarantee had expired on 31 December 1997 and that the defendant was no longer under any obligation to pay after the expiry of the guarantee. The High Court judge thus dismissed the plaintiff's application with costs. This was the plaintiff's appeal against that decision.

E

F

G

H

Held, allowing the appeal with costs:

I

(1) The letter of guarantee issued by the defendant was a pure on demand guarantee, and a demand in writing would trigger off the guarantee. According to the terms and conditions of the guarantee it was clear that the guarantee was not dependent or conditional upon the production of any document or any evidence of breach of any contractual obligation

between the plaintiff, the beneficiary of the guarantee, and BMS. As such, if not for the intervening ex-parte application for an interlocutory injunction, the plaintiff's claim for the money under the guarantee would have been in good order and the defendant would be duty bound to pay (see paras 8–10).

(2) Although the defendant contended that the ex parte interlocutory injunction was issued earlier than the sending of the letter of demand, the fact remained that the letter of demand was served on the defendant well before the expiry of the guarantee, ie 31 December 1997. As the interlocutory injunction had been set aside, the letter of demand issued on 23 December 1997 was good and valid as it was served within the life span and validity period of the guarantee. Thus, the defendant was legally bound to honour the guarantee (see paras 11–12).

[Bahasa Malaysia summary

Apabila Bacom Marketing Sdn Bhd ('BMS'), kontraktor, memasuki kontrak dengan plaintif, defendan bank mengeluarkan surat jaminan, di mana ia secara mutlak menjamin dan bersetuju untuk tidak menarik balik membayar plaintif tuntutan wang berjumlah RM1,063,444.30. Jaminan ini mula berkuat kuasa dari 1 Januari 1997 hingga 31 Disember 1997. Berikutan kemungkiran kontrak oleh BMS, plaintif mengeluarkan surat tuntutan bertarikh 3 Disember 1997 ('surat tuntutan') kepada defendan menuntut bayaran jumlah yang dinyatakan di dalam surat jaminan. Defendan memohon dan memperolehi injunksi interlokutari ex parte untuk menghalang plaintif daripada mendesak tuntutannya terhadap defendan. Injunksi ex parte tersebut diketepikan berikutan pendengaran inter parte pada 26 September 2000. Plaintif kemudiannya menuntut bayaran jumlah yang dinyatakan di dalam surat jaminan tetapi defendan gagal untuk membuat apa-apa bayaran walaupun terdapat beberapa peringatan oleh plaintif. Ini membawa kepada plaintif memfailkan tindakan ini untuk tidak membayar wang, yang mana plaintif telah menuntut berikutan surat tuntutan, diikuti dengan permohonan penghakiman terus berikutan A 14 Kaedah-Kaedah Mahkamah Tinggi 1980. Pendaftar membenarkan permohonan penghakiman terus plaintif dengan kos tetapi defendan merayu terhadap keputusan tersebut. Hakim Mahkamah Tinggi mendapati bahawa jaminan tersebut tamat tempoh pada 31 Disember 1997 dan bahawa defendan bukan lagi di bawah mana-mana kewajipan untuk membayar selepas jaminan tersebut tamat tempoh. Hakim Mahkamah Tinggi oleh itu menolak permohonan plaintif dengan kos. Ini adalah rayuan plaintif terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan dengan kos:

(1) Surat jaminan yang dikeluarkan oleh defendan adalah jaminan tuntutan tulen, dan tuntutan bertulis akan mencetuskan jaminan tersebut. Menurut terma-terma dan syarat-syarat jaminan ia adalah jelas bahawa

jaminan bukan bergantung atau bersyarat ke atas pengemukaan apa-apa dokumen atau apa-apa keterangan kemungkiran mana-mana kewajipan kontrak di antara plaintif, benefisiari jaminan tersebut, dan BMS. Oleh itu, jika tidak kerana permohonan ex parte mencelah bagi injunksi interlokutari, tuntutan plaintif untuk wang di bawah jaminan akan berada dalam keadaan baik dan defendan berkewajipan untuk membayar (lihat perenggan 8–10).

(2) Walaupun defendan berhujah bahawa injunksi interlokutari ex parte dikeluarkan terlebih dahulu daripada penghantaran surat tuntutan, fakta kekal bahawa surat tuntutan diserahkan ke atas defendan betul-betul sebelum tamat tempoh jaminan tersebut, iaitu 31 Disember 1997. Memandangkan injunksi interlokutari tersebut diketepikan, surat tuntutan yang dikeluarkan pada 23 Disember 1997 adalah selamat dan sah memandangkan ia diserahkan dalam masa jangka hayat dan tempoh sah jaminan tersebut. Oleh itu, defendan dari segi undang-undang wajib untuk membayar jaminan tersebut (lihat perenggan 11–12).]

Notes

For cases on construction of guarantee, see 3(3) *Mallal's Digest* (4th Ed 2011 Reissue) para 4600–4622.

Legislation referred to

Rules of the High Court 1980 O 14

Appeal from: Civil Suit No D4–22–4 of 2001 (High Court, Kuala Lumpur)

J Doshi (Mah-Kamariyah & Partners) for the appellant.
BH Yap (Abdullah & Zainuddin) for the respondent.

Azhar Ma'ah JCA (delivering judgment of the court):

[1] At the High Court below, the plaintiff (now the appellant before us) instituted a proceedings against the defendant (now the respondent in this appeal) for non-payment of monies which the plaintiff had claimed pursuant to a letter of demand dated 23 December 1997 on a letter of guarantee issued by the defendant at the instant of one Bacom Marketing Sdn Bhd who was a contractor for the plaintiff in respect of certain contract entered into between the plaintiff and Bacom Marketing Sdn Bhd.

[2] According to the plaintiff, by the said letter of guarantee the defendant absolutely guaranteed and irrevocably agreed to pay to the plaintiff the amount of RM1,063,444.30 subject to the following terms and conditions, inter alia:

(a) the said sum of Ringgit Malaysia One Million Sixty Three Thousand Four

Hundred Forty Four and Sen Thirty Only (RM1,063,444.30) shall be paid by us forthwith ON DEMAND by you in writing without you having to assign any reason whatsoever for such demand;

(b) the said sum of Ringgit Malaysia One Million Sixty Three Thousand Four Hundred Forty Four and Sen Thirty Only (RM1,063,444.30) shall be paid by us forthwith to you irrespective of whether or not there is any dispute between the said contractor and yourselves (Felda Plantations Sdn. Bhd.) in respect of or relating to the said contract or in respect of any other matter and irrespective of whether or not such said dispute, if any, has been settled, resolved, litigated or adjudicated upon or otherwise howsoever;

(c) this Guarantee is effective from 1st day of January 1997 to 31st day of December 1997.

THE CLAIM

[3] Following an alleged breach of the contract by Bacom Marketing Sdn Bhd, the plaintiff issued to the defendant a letter of demand dated 23 December 1997 demanding that payment be made to Felda Plantations Sdn Bhd in the amount stated in the letter of guarantee. Evidence shows that the letter of demand was received by the defendant at 3.35pm on 23 December 1997.

[4] The problem cropped up when an ex parte interlocutory injunction of 22 December 1997 was issued against the plaintiff at the instant of the defendant vide Kuala Lumpur Civil Suit No D1(D7)-22–1401 of 1997, whereby, inter alia:

> … Defendan dihalang secara sendiri atau melalui pekerja-pekerjanya dan ejen-ejennya atau sebaliknya dan satu injunksi hendaklah dan dengan ini diberi untuk menghalang mereka atau setiap daripada mereka menyerahkan tuntutan terhadap Jaminan Bank Arab-Malaysian Bank Berhad No. PG 0006-KCH yang bertarikh 20.1.1997 dalam apa cara sekalipun.
>
> Defendan dihalang secara sendiri atau melalui pekerja-pekerjanya atau ejen-ejennya atau sebaliknya dan satu injunksi hendaklah dan dengan ini diberi untuk menghalang mereka atau setiap daripada mereka daripada menerima sebarang wang dalam apa cara sekalipun yang dibayar oleh Arab-Malaysian Bank Berhad No. PG 0006-KCH yang bertarikh 20.1.1997.

[5] The plaintiff never applied to set aside the above order which remained effective until its expiry on 5 December 1998. However, it was extended by consent until the disposal of its interparte hearing. The said exparte injunction was set aside following an interparte hearing on 26 September 2000. Following this event the plaintiff had through their solicitors letter dated 29 September

2000 informed the defendant that the interlocutory injunction was set aside and that payment has to be made on the terms stated in the letter of demand issued on 23 December 1997.

[6] The defendant failed to make any payment despite the plaintiff's numerous reminders. This led to the plaintiff filing the present action that was subsequently followed by an application for summary judgment pursuant to O 14 of the Rules of the High Court 1980. The learned High Court judge on hearing the defendant's appeal against the registrar's decision allowed the appeal and dismissed the plaintiff's application with costs. Hence, this appeal before us.

[7] The learned High Court judge in his grounds of judgment rationalised his decision as follows:

> Since the guarantee expired on 31 December 1997, the defendant was no longer under any obligation to pay after the expiry of the guarantee … A judgment or order takes effect from the day of its date since … per O 42 r 7(1) of the order takes effect from 22 December 1997, and it restrained the plaintiff from issuing any letter of demand against the guarantee, the letter of demand becomes void and unenforceable. Knowledge of the defendant as to whether the letter of demand is void and unenforceable or otherwise is irrelevant. Since the letter of demand is void and unenforceable, there was no obligation on the part of the defendant to honour it … The defendant has succeeded to show cause to the contrary. The plaintiff has failed to demonstrate that the defendant has no defence. The plaintiff's application for leave to enter summary judgment under O 14 of the Rules of the High Court 1980 must therefore be dismissed with costs.

[8] Putting aside for a moment the intervening event that occurred preceding the issuance of the letter of demand by the plaintiff ie the exparte interlocutory injunction dated 22 September 1997, an examination of the 'Security Guarantee No. PG 0006-KCH' dated 20 January 1997 indicates that the instrument in question was a pure on demand guarantee and that a demand in writing would trigger off the guarantee. Going by the terms and conditions stated in the instrument it is extremely clear that the guarantee was not dependent or conditional upon the production of any document or any evidence of breach of any contractual obligation between Felda Plantations Sdn Bhd, the beneficiary of the guarantee and Bacom Marketing Sdn Bhd.

[9] But for the exparte interlocutory injunction issued against the plaintiff at the instant of Bacom Marketing Sdn Bhd, the defendant in this case was under an absolute obligation to make payment to the plaintiff pursuant to the guarantee in question. Evidence wise, it is an undisputed fact that the plaintiff had on 23 September 1997 issued on the defendant a letter of demand entitled 'Notis Tuntutan Wang Tunai' demanding a sum of RM1,063,444.30 to be

released to Felda Plantations Sdn Bhd forthwith pursuant to the guarantee. Unfortunately, the action by the plaintiff in exercising and enforcing their legal right under the guarantee was short-circuited by the defendant by running to court to get an exparte interlocutory injunction, restraining the plaintiff from asserting their claim against the defendant. In this regard, it is pertinent to note that Bacom's exparte interlocutory injunction was subsequently set aside following an interparte hearing, though some three years later.

[10] What is important to note here is that the plaintiff's attempt to assert and exercise their right to the money was clearly circumvented by Bacom's Marketing Sdn Bhd by the latter's unilateral action which subsequently was proved through the interparte hearing to be improper and thus set aside. It is also to be noted that had it not for this intervening action by Bacom in taking out the exparte interlocutory injunction, the plaintiffs claim for the money under the guarantee would have been in good order and the defendant would be duty bound to pay.

[11] Over and above the two aforementioned terms and conditions in the guarantee ie (a) and (b) the instrument also stipulated that any claim thereunder must be received in writing at this office by 31 December 1997. In this regard, parties are on common ground that the plaintiff had on 23 December 1997 issued a letter of demand pursuant to the guarantee which was faxed to the defendant's office in Kuching. Under the circumstances, although the defendant contended that the exparte interlocutory injunction was issued and brought to the notice of the plaintiff earlier than the sending of the letter of demand, the fact remained that the demand was served on the defendant well before the expiry of the guarantee ie 31 December 1997.

[12] As the issue of the interlocutory injunction by Bacom on the plaintiff has been proved to be improper and thus set aside, though much later, we are of the view that the notice of demand issued on the defendant on 23 December 1997 was good and valid as it was served within the life span and validity period of the guarantee. Thus, the defendant after the interlocutory injunction has been set aside is legally bound to honour the guarantee. Hence, we allowed the appeal with costs.

Appeal allowed with costs.

Reported by Kohila Nesan